IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.266 OF 2006

Shivshankar Chhannuseth Soni ...Appellant
(Original Defendant)

Vs.

Kalikaprasad Mahadeo Soni ...Respondent
(Original Plaintiff)

Mr K.K. Pandey for the Appellant.

Mr O.S. Kutty for the Respondent.

CORAM : KSHITIJ R. VYAS, C.J. &
ABHAY S. OKA, J.

DATE : JUNE 27, 2006.

P.C.:

1. Heard the learned Counsel appearing for the parties. By this Appeal, the original Defendant has taken exception to the Judgment and Order dated 01st February, 2006 passed by the learned single Judge in a Notice of Motion taken out by the Respondent-Plaintiff.

2. The Respondent-Plaintiff filed a suit for declaration that the Appellant is a rank trespasser in respect of the suit business by the name "Vinod Cold Drinks and Sugar Cane Juice" and suit premises situate

at Shop No.1 which is marked in red colour on the plan annexed to the plaint. A declaration is also prayed that the Appellant has no right, title and interest in the business premises and the furniture and fixtures therein. The Respondent- Plaintiff also prayed for a decree of possession and a decree directing the Appellant to pay arrears of compensation. The case of the Respondent-Plaintiff is that he was a licensee in respect of the commercial premises admeasuring 280 sq. feet (28ft X 10ft) with mezzanine floor situated at Henry Chawl, Opposite Nelco, Mahakali Caves Road, Andheri (East), Mumbai. Somewhere in the year 1975, the Respondent acquired tenancy rights in respect of the said commercial premises. From the year 1978 the Respondent-Plaintiff started using the said premises for scrap business. In the year 1980, the Respondent-Plaintiff got the said premises repaired and the ground floor was converted into three compartments which were numbered as Shop Nos.1, 2 and 3 respectively having separate entrances covered by rolling shutters. The Respondent-Plaintiff started the business of Vinod Cold Drinks and Sugar Cane Juice in Shop No.1. In the second compartment the Respondent-Plaintiff started business of stationery items and in the third one he continued his old business of scrap metal. According to the Respondent,

on 29th June, 1989 the original owner of the property sold the entire premises which were intially numbered as House No.1 and subsequently numbered as Shop No.3 to the Respondent-Plaintiff by executing an Agreement for Sale.

3. According to the Respondent-Plaintiff the Appellant is his distant relative. As he was unemployed, the Respondent-Plaintiff gave him employment. From the year 1980 the Appellant started assisting the Respondent-Plaintiff in the business of Vinod Cold Drinks and Sugar Cane Juice and he was being paid daily wages. Ultimately, the Appellant started managing the said business and used to regularly give accounts of the business to the Respondent-Plaintiff. The Respondent-Plaintiff had given a duplicate key of the business premises to the Appellant to enable him to open and close the shop. However, the Appellant taking advantage of the Respondent's absence from Mumbai obtained a licence from Police Department in his name. The Appellant also obtained a certificate under the Bombay Shops and Establishments Act, 1948 in his name. The Appellant filed a civil suit in the City Civil Court against the Respondent-Plaintiff on the basis of false documents procured by him. According to the

Respondent-Plaintiff after filing of the suit, the Appellant forcibly entered the suit premises and applied for ex-parte injunction. The present suit is filed on the ground that the Appellant is a trespasser in the business premises of the Vinod Cold Drinks and Sugar Cane Juice.

4. A Notice of Motion was taken out in the said suit by the Respondent-Plaintiff praying for temporary injunction and also for appointment of a Court Receiver. The Notice of Motion was contested by the Appellant by filing a reply. The contention raised by the Appellant in the said reply is that the Appellant was carrying on business in the suit premises all along in his own right and the Respondent-Plaintiff has no concern with the same.

5. By the impugned order, the Court Receiver has been appointed in terms of prayer clause (c). The Court Receiver has been directed not to dispossess the Appellant and to appoint him as his agent on such terms and conditions of security and compensation as the receiver may deem fit. It was directed that if the Appellant was not ready and willing to take agency agreement, the Receiver will hold bidding and will appoint highest bidder as the agent.

6. The learned Counsel appearing for the Appellant submitted that the effect of the impugned order is that the Appellant will be dispossessed though he is in long standing settled possession of the property in dispute. He submitted that without establishing title to the property in question, the Respondent-Plaintiff has been granted a drastic relief of appointment of Court Receiver. He submitted that the Respondent-Plaintiff has no right in respect of the property and at his instance the Court Receiver could not have been appointed as the Appellant is admittedly carrying on business from the year 1978-79. The learned Counsel appearing for the Respondent-Plaintiff supported the impugned Judgment and Order.

7. We have considered the rival submissions. In paragraph No.2 of the impugned order it is noted that the learned Counsel appearing for the Appellant submitted before the learned single Judge during the course of hearing of Notice of Motion that all the three shops were jointly constructed by the Appellant and the Respondent and the premises subject matter of dispute was given to the Appellant and the Appellant was enjoying the same as the owner thereof. The

perusal of the impugned order shows that this was the only contention raised on the behalf of the Appellant. In paragraph No.2, a prima facie finding has been recorded that there is no evidence or material to show that the construction was jointly made by the Appellant and the Respondent. The learned single Judge has noted that infact the learned Counsel appearing for the Appellant fairly conceded before him that there was no material to show that there was a joint construction.

8. The position which emerges is that during the course of arguments the Appellant did not dispute the right of the Respondent-Plaintiff but contended that the construction has been jointly made. However, there is no material whatsoever on record to show that the construction has been jointly made. In view of this position and considering the assertions made in the plaint, the learned single Judge has appointed Court Receiver. In our view, it is very difficult to find fault with the said order. The learned Judge has protected the Appellant by appointing him as the agent of the receiver.

9. The learned Counsel appearing for the Appellant without prejudice to the rights and

contention of the Appellant submitted that the requirement of payment of royalty may be dispensed with. However, we cannot accede to the said request as admittedly the Appellant is carrying on business in the premises. The learned Counsel thereafter submitted that the royalty of Rs.6,000/- per month fixed by the Court Receiver is on the higher side and the same may be reduced. The learned Counsel appearing for the Respondent responded that so far as fixation of reasonable amount of royalty is concerned, he is willing to leave it to this Court. After considering the facts and circumstances of the case we feel that a sum of Rs.2,000/- per month will be the appropriate royalty payable by the Appellant.

10. Hence, we pass the following order:

(i) The impugned Judgment and Order is confirmed and the Appeal is dismissed with no orders as to costs.

(ii) The order of the Court Receiver fixing royalty is modified and the royalty will be Rs.2,000/- per month instead of the royalty amount fixed by the Court Receiver.

(iii) The Court Receiver and all concerned to act upon an authenticated copy of this order.

CHIEF JUSTICE

ABHAY S. OKA, J